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Supreme Court, U.S.
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No. 03 - 1633

IN THE

Supreme Court of the United States

"*In Re* ALLEGRA D. HEMPHILL"
Petitioner,

v.

THE PROCTER & GAMBLE COMPANY,
and KIMBERLY-CLARK CORPORATION,
and JOHNSON & JOHNSON
and subsidiary McNEIL-PPC, INC.

Respondent(s).

On a Petition for
REHEARING WRIT OF MANDAMUS
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR REHEARING WRIT OF MANDAMUS

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QUESTIONS PRESENTED FOR REVIEW

1. There was absolutely no verbal communication with the district court judge, Judge Chasanow, in either case, Hemphill v. Procter & Gamble Co. et al., 258 F. Supp. 2d. 410 (D. Md. 2003) DKC 2002-3736, or Hemphill v. McNeil-PPC, Inc., 134 F.Supp. 2d. 719 (D.Md.2001) DKC 99-654. There was "no day in court", " no jury trial" and "no hearing". The district court judge denies the constitutionality in a patent case is protected by a seventh amendment right (jury trial). Thus, the extraordinary question for the Supreme Court is,

> Is the way the district court judge interprets a Maryland Local Rule 105.6 as "Fully briefed and **no hearing** deemed necessary" unconstitutional?

2. The district court judge made a recent change in Markman v. Westview Instruments, Inc., 52 F3d. 967, (Fed. Cir. 1995) 979 (en banc), aff'd. 517 U.S. 370 (1996):

"claim construction is for "the court" to decide."

This change could overturn the constitutionality in patent cases being decided by a jury trial. The change in *Markman* is unclear about which court, is "the court" to apply the law 35 U.S.C.§ 112, ¶2 (claims distinctly claiming), but the Supreme Court instructed the Federal Circuit to sharpen the criteria for determining equivalency (element by element basis).

This change in controlling law "subverts the balances"

for the Federal Circuit to evaluate the full range of equivalency under the doctrine of equivalents. The Federal Circuit had the wrong impression that the law was already applied so that neither court in this case completes claim construction in the '720 patent. The question before the Supreme Court is,

> Without a jury trial, should the above *change in law* include the Supreme Court as "the court" to decide and settle the issue of claim construction under 35 U.S.C. §112 for a literal analysis and/or doctrine of equivalents?

3. The "automatic estoppel" in this case, anticipated the applicant would surrender structure in the '720 patent, while awaiting claim construction. The sole argument permitted at summary judgement was "non-infringement". The cause of action: Literal Patent Infringement 28 U.S.C.§1338 was never heard and the application of patent law 35 U.S.C.§ 112,¶2 was not performed. If the district court judge can deny a literal analysis without showing her work or stating a reason, and the factual determinations made by the district court judge are essential to the judgement in the Federal Circuit conflicting with other US Court of Appeals,

> What are the factors *to know* there is a "genuine" issue for a jury trial?

PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT

The parties to the proceeding, are, as follows:

The Petitioner is Allegra D. Hemphill.

The Procter & Gamble Company is a parent company of Procter & Gamble Co. in Cincinnati, Ohio.

Kimberly-Clark Corporation in Dallas, Texas is a parent company of Kimberly-Clark in Neenah, Wisconsin.

Johnson & Johnson , at One Johnson & Johnson Plaza New Brunswick, New Jersey 08933 is a parent company of McNeil-PPC, Inc.

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> "[I]t is essential for purposes of review by the Supreme Court that it appear from the record that a federal question was presented, that the disposition of that question was necessary to the determination of the case and that the judgement could not have been rendered without deciding it." See Southwestern Bell Tel. Co. v. Oklahoma, 303 US 206 (1938).

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THE CONSTITUTION OF THE UNITED STATES:

First Amendment Right: 8

"*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof, or *abridging the freedom of speech,* or of the press, or the right of the people to peaceably assemble, *and to petition the Government for a redress of grievances.*"

Seventh Amendment Right:.....3, 9

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Fourteenth Amendment Right :.....5, 6

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or [intellectual] property, without due process of law; nor to deny any person*

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within its jurisdiction the equal protection of the laws."

Statutes

Title 35 United States Code § 102.....1,5, 6, 9
Title 35 United States Code § 103.....1,5, 7, 9
Title 35 United States Code §112.....1, 3, 5, 6, 7, 10

United States Patents and Trademarks Office

Hemphill, United States Letters Patent 4,557,720
See "WHAT I CLAIM' in the Hemphill '720 patent at Col. 6, ll. 59 through Col. 7, ll. 5.

CLAIM 1 READS:

1. A vaginal swab comprised of an outer housing having a closed and open end on opposing ends thereof, said housing including an annular band defining said open end and a plurality of frangible seams that together define a pair of removable members and a pair of housing segments hingably secured to said annular band following removal of said removable members, a swab core member having a predetermined exterior shape, said core member having an annular base with an outer diameter equal to the inner diameter of said annular band and an adsorbent member secured to said core member, said core member being secured within said housing so that said adsorbent member is enclosed therein.

See "WHAT I CLAIM' in the Hemphill '720 patent at Col. 7, ll. 6, through Col. 8, ll. 9.

CLAIM 2 READS:

2. A vaginal swab comprising an outer housing including an inner case member and an outer case member at least part of which is connected to and said overlies inner case member;

a core member, at least one layer of porous material secured to said core member, and housing means for both supporting and enclosing said core member, said core member being secured to said housing means, having at least two portions movable relative to one another between first and second positions for enclosing said core member when in said first position and for both, exposing said core member and the said porous padding secured thereto and for forming a handle for said swab when in said second position.

I, ALLEGRA D. HEMPHILL, HEREBY make, formal, written, request to the Supreme Court of the United States, pursuant to Supreme Court Rule 44. Allegra D. Hemphill possesses ownership rights, immunities and privileges in intellectual property, United States Letters Patent 4,557,720. The '720 patent is in compliance with *all* requirements under the laws of the United States Title 35, United States Code, Section §102 §103 and §112. Allegra D. Hemphill is *entitled to* the protection under the Constitution of the United States.[1]

"Many suits [such as this one] will present a federal question because **a federal law creates the action**."[2] American Well Works Co. v. Layne & Bowler Co., 241 U.S.257, 260 (1916). In the state of Maryland, the district court judge Deborah K. Chasanow had **no authority** whatsoever to reject the above federal laws of the United States which governs a patent infringement action. Usually, "[s]tate courts are not disabled from hearing actions brought

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[1]The fundamental right to a statutory interpretation is observed under the supreme laws of the land and preserved under the Constitution of the United States. See I, VII and XIV Amendment Rights.

[2] The **formal, written petition** was filed on 11/8/02.
See Docket entries for Hemphill v. Procter & Gamble Co et al
Case No. DKC 2002-3736
Jury Demand: Plaintiff
Nature of Suit: 830 Patent Infringement
Jurisdiction: Federal Question
Cause: 28:1338 Patent Infringement
Note: Damages were properly listed and recorded on the Civil Sheet and filed with the Clerk of the court.

under Art. III, Section 2, **but they must apply federal law."** The federal question is not finished because the lower courts did not apply mandatory federal law. App. 74A - 77A.[3] "The Supreme Court Justices have competent powers to ORDER a lower court to *apply federal law.* The patent is a grant of jurisdiction **to enforce the guarantees recognized and enacted by Congress."** Since the case arises under the Constitution and laws of the United States, a Supreme Court Justice has jurisdiction under Art. III, Section 2 to determine for himself/herself as to why the petition is remarkable and may not be ignored.

PUBLIC INTEREST

The public interest in this action will be significant because the products accused of infringing the claims in the '720 patent are well known.[4] Be it known, the products accused of infringing are identified in the marketplace as maxi-pads, mini-pads, and ultra-pads. The companies do not have a patent to retain any ownership rights. The United States Letters Patent 4,557,720 provides

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[3] See Hemphill v. Procter & Gamble etal, 258 F. Supp. 2d. 410 (D. Md. 2003) **Case No. DKC 2002-3736**
The US Court of Appeals for the Federal Circuit did not publish **Case No. 03-1463.** Radar, Bryson and Gajarsa Circuit Judges.

[4] Brand names such as, but not limited to, Serenity ® and Carefree ® and Always ® and Kotex ® and Stayfree ® and Security® and Poise ® are manufactured by companies such as, but not limited to, Procter & Gamble Co. and Kimberly Clark Corporation and Johnson & Johnson and McNeil-PPC, Inc..

coverage for the "accused products" which surpasses the value requisite for a jury trial. Seventh Amendment.

FEDERAL QUESTION

> "[I]t is essential for purposes of review by the Supreme Court that it appear from the record that a federal question was presented, that the disposition of that question was necessary to the determination of the case and that the judgement could not have been rendered without deciding it." Southwestern Bell Tel. Co. v. Oklahoma, 303 US 206 (1938).

Allegra D. Hemphill exercised her right to petition the court for patent infringement. A judge interprets federal law as it relates to a patent infringement case. The federal law 35 U.S.C. §112, ¶ 2 mandates the Courts acknowledge and recognize:

> *"The specification shall conclude with one or more* ***claims particularly pointing out and distinctly claiming*** *the subject matter* ***which the applicant [Allegra Hemphill] regards as [her] invention."***

To bring ORDER in this case, **literal infringement** is: "if the device [an accused product] falls within the claimed element [in the '720 patent] infringement is made out and that [should have been the end of it]."[5]

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[5] The Response Brief of Allegra D. Hemphill **produced** actual exhibits showing the infringement and **provided** photographs of the exhibits with **a side by side comparison** with the claims in the '720

In the lower court, the 'normal course of legal proceedings was not implemented in accordance with established rules and principles'. Judge Chasanow entertained "Summary Judgement for NON-infringement," and only permitted "NON-infringement issues" during the proceedings. *App.12A.* Chasanow ***disarranged*** the lawsuits, and therefore, misdirected the proceedings.[6] Judge Chasanow *participated* in the "NON-infringement" summary judgement, in which, the federal laws were **wrongfully removed.** The laws are not anywhere in her judgements. App. 7A - 26A. and 41A-68A. The Supreme Court only has to look and see for itself that the lower courts completely *left out* **federal law** in all of the judgements. App. 1A -68A.

Hemphill 'raises the above federal constitutional issue with sufficient precision' to have enabled the lower court to interpret federal law, in its original text so that ***due process of the law,*** is performed. In this way, the legally established Nature of Suit: 830 Patent Infringement, Legal Jurisdiction: Federal Question and Cause: 28:1338 Patent Infringement may be heard and *'claim construction* ***as a matter of law****'* will be done. App. 'not permissible' at 9A, 'rejected' at 22A, 42A, 45A. Instead, judge Chasanow continued her focus solely on the "NON-infringement" issue which avoided and evades the

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patent. See App. Vol. 2, 372A- 385A.

[6]See 'counterclaim' at 11A, 12A, 14A, 26A.

responsibility that applying federal law in a patent infringement case is "due process of law." App.7A-10A. The "NON-infringement issue" is a systematic plan of action, intentionally meant to distract attention away from 'due process of federal law' and wrongfully *takes over*, to usurp intellectual property rights.[7] In fact, Chasanow did not determine a legal jurisdiction for the NON-infringement lawsuit, the nature of such an issue is questionable and the legal cause is uncertain. It merely afforded her opportunity to illegally supplant one case [patent infringement] for another [NON-infringement] which explains why "[t]he state court judgement is ambiguous [and] without written opinion stating the ground relied on." Poafpybitty v. Skelly Oil Co. 390 US 365,375-376 (1968).

"NON-infringement" is simply agreeing not to apply federal law which turns 'due process of law' topsy-turvy. The "NON-infringement" issue became a crafty scheme to achieve an objective which neglects the legal and rightful owner and deprives one from enjoying the full scope of intellectual property rights.[8] Therefore, failure to proceed with the patent infringement lawsuit encroached upon the fourteenth amendment right of Allegra D. Hemphill:

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[7] The corporations infringe upon the claims in the Hemphill '720 patent and they never *ask for* permission .

[8] Chasanow denied federal law 35 U.S.C. §112, ¶ 2, she denied structures found in the patent relative to the products accused of infringing; and she denied the *claim defines the invention* as it relates to 35 U.S.C. §102 and 35 U.S.C. §103.

> *"nor shall any State deprive any person of [intellectual] property without due process of law"*
> **"**[T]he right of immunity will be supported because the laws of the United States were not given any construction or effect, [and defeated because judge Chasanow was **withholding the federal law** from a patent infringement action and **there is no federal law** in the "NON- infringement" issue.]" Gully v. First National Bank in Meridian 299 US 109 117 (1936). J.I. Case Co. v. Borak 377 US 426 (1964).

The fact judge Chasanow rejected mandatory federal law is an abuse of her discretion and a violation of the **fourteenth amendment right**:

> *"nor to deny any person [Allegra D. Hemphill] within its jurisdiction the equal protection of the laws."*

The "NON-infringement" issue induced a judge to refuse to allow 'the applicant' [Allegra D. Hemphill] her right to respond in her patent infringement action under federal law 35 U.S.C. §112, ¶ 2: *"which the applicant regards her invention*" The intrigue is such that the judge disregards the explicit, authoritative order for: *'claims particularly pointing out and distinctly claiming*' under 35 U.S.C. §112, ¶ 2 by 'misreading the claim' and 'reading into the claim.' The judge omits full disclosure of structures found in the '720 patent. Then, this judge deviates, turning away from the "wholeness in truth" found under 35 U.S.C. §102 and

35 U.S.C. §103.[9]

The "NON-infringement" issue enabled corporations to continue their infringing acts. Undeniably, judge Chasanow advanced and promoted private interests and personal priorities of big business for [non]-infringement without federal law, and unjustly rejected every argument that construes the claims with federal law [determining patent infringement]. The lower court judge disavowed every sense of "evenhandedness" by negating the existence of *any/all* patent federal law. Her only rationale for withholding the statutory interpretation was to "equalize the issues" because she *knew* the corporations did not have a patent. In doing so, they 'trample under foot' both, the federal laws in a patent infringement lawsuit and the Constitution of the United States.

Clearly, judge Chasanow was influenced by the "NON-infringement issues," but she subverted claim construction under mandatory federal law by deliberately ***misinterpreting case law*** *in* Markman v. Westiview Instruments, Inc., 52 F3d. 967,979 (Fed. Cir. 1995)(en banc), aff'd, 517 U.S. 370 (1996). See App. 10A, 43A. Unequivocally, when "*claim construction is a matter of law for the court to decide*", it does not intend for the court to decide [NOT to apply federal law]. In fact, *this case law*

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[9]The corporations were allowed to ' point out' other structures found in the '720 patent unlike the products accused of infringing and choose dictionaries rather than let the *claim define 'a* vaginal *swab' under* 35 U.S.C. §112, ¶ 2. See 'dictionary' App. 22A, 35A,36A.

compelled the court, without doubt nor reserve, that **"[s]tatutes like patents *are enforceable*....** *"at 987.* The federal law is the absolute. The federal law is not optional

If circumventing the law becomes a definite trend in the lower courts, it will be the beginning of 'a perverse administration of justice.' App. **41A-45A.and 7A-10A.** A judge *adhering to*, or *abiding in* the law, will interpret federal law in a patent case and **no decision could have been rendered without federal patent law.** Thus, a Supreme Court Jurists has responsibility to *stand up to* the injustices and *correct* the lower court judgements, as required under Art. III, Section 2: "The only power the Supreme Court has over state judgements is to *correct them* to the extent that they incorrectly adjudge federal rights."

Judge Chasanow rendered her judgements ***paraphrasing*** a Maryland Local Rules 105.6: "*fully briefed* [NON-infringement issues] *and no hearing* [patent infringement issues] *deemed necessary*" and closed the case. App. 8A, 12A. 48A. This above state rule of conduct or action recognized as binding and enforced by a controlling authority should be declared unconstitutional because of the manner in which it was imposed. The state law violates the **first amendment right:** *"[m]ake no law . .. that abridges freedom of speech . . . and to petition the Government for a redress of grievances. ".*

Judge Deborah K. Chasanow has partaken in summary judgements for "NON-infringement" and

wrongfully averted hearing the formal, written request for patent infringement, and again, denied the petition for Rehearing about the patent infringement action. By taking it upon herself, judge Chasanow is *keeping out* and ***prohibiting*** **federal law** from entering the lawsuit and is thereby *reducing the scope.* App.'not permissible' at 9A, 'rejected' at 22A, 42A, 45A. The state law directly prevented the legal and rightful lawsuit from being heard.

Judge Chasanow *fully understood* Allegra D. Hemphill fulfilled her responsibilities qualifying for a jury trial. Judge Chasanow *knew* Allegra D. Hemphill did not waive any rights to jury trial. Judge Chasanow did not fulfill the courts' responsibility to 'set aside' and save **the seventh amendment right** as the Constitution commands: ***the right*** *to a jury trial* ***shall be preserved***

Unabated, Allegra D. Hemphill and the US PTO, stand on authority that there shall not be any constraints, no restrictions and no limitations to the claims in the '720 patent.[10] App. 'statements made' 20A, 34A, 37A. 59A.

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[10] The US PTO granted the Hemphill '720 Patent because the invention/innovation is not obvious.35 U.S.C. §103. It was new. It was novel. 35 U.S.C. §102 .. App. 74A-77A

> "[i]nnovation, advancement and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote Progress of...useful Arts."

"This is the *standard* expressed in the Constitution **and it may not be ignored**." Calmar. Inc. v. Cook Chem. Co. 383 US1 (1966); United States v. Adams 383 US39 (1966). *Holding in* Hotchkiss v. Greenwood in Graham v. John Deere Co. 383 U.S. 1 (1966).

The final action in the US PTO duly notified the courts: **"NO AMENDMENTS HAVE BEEN MADE TO THE PATENT."** See App. 103A, 106A. Thus, the Supreme Court must exercise its extraordinary powers to restore claim construction under 35 U.S.C. §112,¶ 2 which loosens estoppel(s) that are legally incorrect, fraudulent, or deceitful *because the claims were never amended.*

By **ORDER** from this Supreme Court of the United States, the US Court of Appeals for the Federal Circuit will **enforce** mandatory federal law.

CONCLUSION

Pursuant to Art. III, Section 2, the Supreme Court will grant judicial relief, REHEARING the petition for writ of mandamus, as these circumstances are remarkable.

SUPREME COURT RULE 44.2 CERTIFICATE

Please grant our petition for rehearing. It is "presented in good faith and not for delay . Its grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds" not previously presented in the petition for writ of mandamus, pursuant to 28 U.S.C.§ 1651(a)

Respectfully submitted,

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